No. 92-2038

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a unanimous Federal Circuit panel erred in declining petitioner's invitation to reinterpret the "farmer's exemption" to the Plant Variety Protection Act, which permits farmers to sell otherwise protected seed to other farmers for reproductive purposes, as limited to 1/45th of a farmer's soybean crop, thereby effectively emasculating the exemption.*

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* Asgrow presents as a separate question for review whether sales under the farmer's exemption remain subject to the notice requirement of section 2541(6). Whether the Federal Circuit's correct ruling on this issue should be reviewed by this Court requires no more than a cursory reading of section 2543, which is unambiguous on this point.

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STATEMENT OF THE CASE

The centuries-old right of farmers to sell seed grown on their farms to other farmers is preserved in the Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581 ("PVPA"). Shortly after the PVPA's promulgation in 1970, the United States Department of Agriculture ("USDA") affirmed, and the farming industry accepted, the right of farmers to sell otherwise protected seed to other farmers for reproductive purposes, which practice is sometimes referred to as "brown bagging."[1] Despite the preservation of the farmer's right to sell protected seed to other farmers in the PVPA (and to plant such saved seed on their own farms), the seed industry has flourished under the PVPA. Many new firms have entered the

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[1] Except where noted, record cites to items discussed in this Statement of the Case are provided under the heading "Argument," infra.

market. Like other seed companies, Asgrow's profits have steadily increased.

In spite of its success, the seed industry in general, and Asgrow, in particular, in recent years have attempted to turn the PVPA into a virtual seed monopoly. The motivation behind this effort is clear: its own seeds and seed licenses obtained by assignments from state universities and government-funded research laboratories, such as the varieties at issue in this suit, would be much more valuable. Indeed, in countries in Europe where farmers have lost the right to sell protected varieties to other farmers, and even to replant on their own farms, the price of seed is substantially higher than in the United States.

First, the American Seed Trade Association, of which Asgrow is a member, pressed USDA's Plant Variety Protection Office for an interpretation severely

limiting the right of farmers to sell to other farmers. USDA refused to issue such an interpretation. Thereafter, Asgrow began an extensive course of litigation against "brown baggers." Indeed, through the trade press, Asgrow's in-house counsel offered litigation services to other seed companies and explained how suits could cause "headaches" for farmers exercising their rights under the PVPA.[2] Faced with the high costs of litigation compared with the meager profits from brown-bagging, most defendants readily agreed to stop this activity, even though they had the right to continue. Becky and Denny Winterboer decided to stand and fight.

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[2] Dan Kirkpatrick, Communications Specialist, Asgrow Seed Company, Enforcing the Letter of the Law, Seed World, Dec. 1991, filed with the Federal Circuit in the Addendum to Brief of Appellants at SA47-48; PVP Rights Should be Enforced, Seed Industry, Aug./Sept. 1991, Addendum to Brief of Appellants at SA49-50.

The various interpretations of the PVPA's farmer's exemption pressed by Asgrow and the amici in this case torture the plain language of the statute and share one overarching defect -- each would vitiate the exemption. Whether it is necessary to destroy the exemption to save the PVPA, as Asgrow maintains, is a question for the United States Congress, not this Court. Congress can consider the policy issues implicated by granting seed companies further patent-like protection, including the serious concerns about the ensuing elimination of genetic biodiversity in this nation's seed crops, and the economic effects of granting complete monopolies on seed varieties to seed companies. This Court rightfully should decline to reinterpret the PVPA based on petitioner's overly focused policy reasons and deny certiorari.

SUMMARY OF ARGUMENT

This case is not worthy of the exceptional exercise of this Court's certiorari jurisdiction. A unanimous panel of the Court of Appeals for the Federal Circuit correctly ruled that the farmer's exemption to the infringement provisions of the PVPA nowhere delimits the right of a farmer to sell seed to other farmers to only 1/45th of the selling farmer's soybean crop. Indeed, such an interpretation would vitiate the farmer's exemption. The opinion is mandated by the plain meaning of the statute and is consistent with the traditional and historical right of farmers to sell seed produced on their farm to other farmers, which right predates the PVPA and was incorporated into it in the form of the farmer's exemption.

Because the Federal Circuit has exclusive jurisdiction over issues arising under the PVPA, there can be no conflict among the lower courts over the statute's interpretation. To the extent the seed industry wants the farmer's exemption to the PVPA to be rewritten to favor seed companies over the interests of farmers, Congress, and not this Court, is the proper forum for this political dispute. Indeed, Congress is presently considering amending the PVPA to eliminate the farmer's exemption.

Nor is this case of sufficient consequence to warrant grant of the writ. Petitioner's scenario of the decline of American agriculture as a result of this decision conflicts with the facts. Even though the industry has long accepted the interpretation reaffirmed by the Federal Circuit's opinion, a large number of new seed companies have entered the market and

existing firms, such as Asgrow, have posted impressive and continually growing profits. In any event, this Court is not the proper forum in which to address this policy issue.

ARGUMENT

I. THE FEDERAL CIRCUIT CORRECTLY INTERPRETED THE FARMER'S EXEMPTION TO THE PVPA

The farmer's exemption to the infringement provisions of the PVPA is straightforward. It provides:

> it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes . . . .

7 U.S.C. § 2543. The Federal Circuit's decision interpreting this provision correctly allows a farmer to sell saved seed for reproductive purposes as long as

the farmer uses a larger amount of his or her crop for nonreproductive purposes.

Asgrow seeks to limit drastically the farmer's right to sell seed to the amount necessary for planting the farmer's ensuing crop the following year -- to 1/45th of his or her crop. Asgrow's "ensuing crop limitation" argument requires elaborate and unnatural approaches to statutory interpretation that compare unfavorably with the Federal Circuit's common sense reasoning.

The difficulty of Asgrow's "ensuing crop limitation" argument is evidenced by the fact that three separate interpretations of section 2543 have been used in this case to justify it, none of which are well-grounded. The first is found in the district court's decision, where section 2543 is edited to imply that the phrase "for seeding purposes" modifies the term "save seed":

> The language of the statute is that, "it shall not infringe any right hereunder for a person to save seed produced by him . . . for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . ."

Petitioner's App. B at 21a (emphasis in original). The district court ruled, without explanation, that a farmer may save only that amount necessary to plant his or her crop for the subsequent crop year, and therefore may not sell more than that amount. Id. at 21a-22a.

The second interpretation justifying the ensuing crop limitation is set forth in Asgrow's brief before the Federal Circuit. Recognizing the implausibility of the district court's decision, Asgrow introduced a new interpretation. It maintained that section 2543 should be broken into two parts, an on-farm seed use exemption and an off-farm seed use

exemption. Asgrow argued that the on-farm exemption applies where the farmer either uses the crop produced from the saved seed on his farm or sells it for non-reproductive use, while the off-farm exemption applies where the farmer qualifies because of his or her primary farming occupation, the sale is made to another farmer for reproductive purposes, the sale complies with state law, and the sale is made from "saved seed." Asgrow asserted that the term "saved seed" must have the same meaning in both parts of section 2543, and therefore the farmer may sell no more than the amount the farmer might be able to use in planting next year's crop.

Now, before this Court, Asgrow presses yet a third interpretation! The interpretation adopted in Asgrow's petition was first included in an amicus brief before the Federal Circuit by Jacob

Hartz Seed Company, and was later used in Asgrow's petition for rehearing in banc.[3] Under its most recent interpretation, Asgrow asserts that because the opening phrase of section 2543 provides that the rest of the first sentence does not apply if the action in question constitutes sexually multiplying a novel variety as a step in marketing the variety, it is a violation of the statute to sell seed unless it was saved only for future use as seed on the farmer's own farm. Petition at 14-20.

The existence of three separate versions of statutory interpretation to justify Asgrow's ensuing crop limitation theory demonstrates the desperation of Asgrow's efforts to turn a farmer's soybean into a pearl for the seed

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[3] Asgrow acknowledges that its current analysis differs from that in its initial brief before the Federal Circuit. Petition at 10.

industry. All of the interpretations offer a fundamentally unnatural and strained reading of the statute. If Congress intended to eliminate the traditional right of farmers to sell seed to other farmers for reproductive purposes, it easily could have done so. Congress in fact had no such intention, and Asgrow's ensuing crop limitation is a preposterous interpretation of the statute.

Moreover, the third version of the ensuing crop limitation must fail, as do the two discarded interpretations, because of a fundamental logical problem: the amount of seed necessary to plant a farmer's ensuing crop is much less than the amount necessary to ensure that the person's "primary" occupation is the growing of crops for sale for other than reproductive purposes. In the case of soybeans, the amount needed for replanting

the next year's crop is 1/45th of the farmer's harvest. Asgrow's ensuing crop limitation theory therefore would render superfluous the "primary farming occupation" language in section 2543, contrary to basic canons of statutory construction.

Throughout its brief, Asgrow insists that the Federal Circuit's reading of the farmer's exemption is contrary to the primary purpose of the PVPA. Petition at 11-13, 23-24 & 28-29. However, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Mertens v. Hewitt Associates, 61 U.S.L.W. 4510, 4514 (U.S. June 1, 199[illegible]) (emphasis in original). Contrary to Asgrow's position, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the

statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987) (emphasis in original).

Farmers have always had a right sell "brown bagged" seed. The PVPA, which was a political compromise between farm interests and the seed industry, preserved this right, with certain specified limitations identified by the Federal Circuit. Constructions of the PVPA by the agencies charged with administering the statute have recognized this right. In 1973, the Commissioner of the Plant Variety Protection Office stated, "[t]here is no limitation as to the amount of sales permitted a grower under Section 113 of the Act [7 U.S.C. § 2543] except to the extent it may affect his 'primary farming occupation' classification upon which the

exemption is based."[4] Later, after the seed industry urged the Plant Variety Protection Office to issue a regulation that would narrowly define the farmer's exemption, it declined to do so.[5] Likewise, a Department of Agriculture report stated with respect to the exemption that if a farmer's primary occupation is the growing of crops, "49 percent of a harvest can be sold as seed."[6] These agency determinations are entitled to deference.

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[4] Letter from S.F. Rollin, Commissioner, Plant Variety Protection Office, to Dr. W.R. Fehr, Iowa State University (April 19, 1973), Addendum to Brief of Appellants at SA35-36.

[5] Memorandum from Kenneth H. Evans, Commissioner, Plant Variety Protection Office, to Paul Fuller, Director, Livestock and Seed Division, Department of Agriculture (October 18-24, 1987), Addendum to Brief of Appellants at SA34.

[6] U.S. Department of Agriculture, Agricultural Economic Report Number 654, Intellectual Property Rights and the Private Seed Industry 4 (1991), Addendum to Brief of Appellants at SA40-42.

Asgrow's proffered interpretation seeks to upset the balance struck by Congress between the interests of farmers and the seed industry in passing the PVPA, which balance was correctly recognized by the Federal Circuit. This Court's limited certiorari review should not be spent to upset this balance.[7]

II. NO CONFLICT AMONG THE CIRCUITS EXISTS

Asgrow labors to create a conflict between the Courts of Appeals for the Federal Circuit and the Fifth Circuit in an effort to bolster its argument in favor of the writ of certiorari. Petition at 27-28. This effort must fail. First, there is no conflict between the instant

[7] Asgrow also contends that a relationship between sections 2541(3) and 2543 requires that simple selling efforts be held as the equivalent of marketing. Petition at 14-16. The Federal Circuit, however, was correct in finding that a qualifying farmer may make limited sales of seed under the farmer's exemption without engaging in the broader activity of marketing proscribed under section 2541(3). Petition, App. A at 12a-13a.

case and the Fifth Circuit's decision in Delta & Pine Land Co. v. Peoples Gin Co., 694 F.2d 1012 (5th Cir. 1983), which merely held that the farmer's exemption applies only to farmers and not third parties.[8] In any event, because the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(1), now possesses exclusive jurisdiction over matters arising under the PVPA, any alleged conflict between it and any other circuit on a PVPA issue must be resolved in favor of the Federal Circuit's position. There is no live conflict among the circuits that this Court needs to resolve. Asgrow's attempt to manufacture such a conflict is unavailing.

[8] Furthermore, the amount of sales of saved seed involved in Delta and Pine Land obviously was in excess of the amount necessary to plant the farmer's ensuing crop, yet the ensuing crop limitation was not addressed in that case. See 694 F.2d at 1014.

III. THIS POLITICAL DISPUTE SHOULD BE LEFT TO CONGRESS

Asgrow's real purpose throughout this litigation has been to modify the legislative compromise embodied in the PVPA between the interests of farmers and the interests of the seed industry. While the PVPA protects developers of new seeds, it also preserves, with certain limitations, the historical right of farmers to sell seeds grown on their farm to other farmers for reproductive purposes. The Federal Circuit's decision correctly delineated the contours of the political compromise embodied in the statute.

To the extent the present Congress believes the balance of interests between the seed industry and farmers embodied in the PVPA should be modified, however, it is empowered to alter the statute. In fact, now pending before the Senate is

consideration of an international treaty, the 1991 Union for the Protection of New Varieties of Plants ("UPOV") Convention, which the United States has signed and which awaits Senate ratification. Ratification of this treaty will require amendments to the PVPA, including the possible elimination of the farmer's exemption. In conjunction with the pending ratification, members of Congress currently are planning to introduce bills to amend the PVPA. For example, Senator Robert Kerrey of Nebraska has drafted legislation that would rescind the farmer's exemption.[9] Section 9 of Senator Kerrey's bill would delete the farmer's exemption by amending the first sentence

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[9] As of the date of the filing of this brief in opposition, the bill had been drafted, and Senator Kerrey was planning to introduce it within coming weeks. Hearings on the bill are scheduled for September 20, 1993. Telephone interview with Marsha Stanton, Office of Senator Kerrey (July 21, 1993).

of section 2543 by striking all that follows the portion of the sentence beginning with "Provided, That . . . ."

In light of the fact that the very language at issue in the Federal Circuit's decision may soon be deleted from the United States Code, it would be an imprudent use of this Court's limited certiorari jurisdiction to hear this case.

IV. ASGROW'S PREDICTIONS OF DIRE CONSEQUENCES RESULTING FROM THE FEDERAL CIRCUIT'S DECISION ARE LAWYERS' HYPERBOLE

Asgrow attempts to portray the Federal Circuit's refusal to vitiate the farmer's exemption to the PVPA as devastating to the seed industry, American agriculture, and the nation's economy as a whole. Petition at 24-26. Asgrow's presentation of the impact of farmer's sales of brown bagged seed on agriculture

and the economy does not square with the facts.

Farmers have always had the right to sell seed grown on their farms. The enactment of the PVPA in 1970 was the first statute to limit this right in any way. Since enactment of the PVPA, which was widely understood to include the farmer's right to sell saved seed under the "primary farming occupation" limitation, research and development by seed companies has proceeded apace. Seed companies have operated quite profitably under the PVPA, and the number of private soybean breeders has increased almost eightfold since the statute's enactment.[10] Significant genetic seed research is also

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[10] Information on seed company profits in recent years, including those of Asgrow's parent, The Upjohn Company, and increases in the number of breeders, was filed below in the Addendum to Brief of Appellants at SA65-70. The evidence shows that the seed business has been very profitable and does not face extinction as the result of brown bagging by small farmers.

conducted by state universities and government facilities, supported by federal tax dollars and mandatory contributions by farmers like the Winterboers. The "parent" seeds developed using public funds are frequently cross-bred by commercial seed companies to create new varieties, which are then certified by the Plant Variety Protection Office and sold by these companies on the retail market for profit.[11] Even though brown bagged seed is less expensive than certified varieties, most farmers nevertheless choose to purchase certified varieties for each annual planting because they are perceived to be superior to second generation seed.

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[11] Such was the case with the varieties at issue in this litigation. See attachments to letter from William H. Bode, Counsel to the Winterboers, to the Honorable Alan D. Lourie, et al. (May 7, 1992).

Further evidence that Asgrow overstates the impact of this case in its petition is the fact that, while publicly traded companies are required to file statements with the Securities and Exchange Commission concerning matters that could impact the value of shareholders' stock, Asgrow's parent, The Upjohn Company, did not even deign to mention the Asgrow v. Winterboer litigation in its 10-K filings! If Asgrow's dire predictions had any substance, Upjohn would be expected to report this to the Commission.

American agriculture was the envy of the world prior to the PVPA's enactment, and has remained so since, despite the continued practice of selling brown bagged seed under the "primary farming occupation" exception. Asgrow's suggestion that the Federal Circuit's decision will destroy American agriculture

is mere lawyers' hyperbole. Moreover, there are other issues with broad ramifications implicated in this controversy, including the need to encourage genetic biodiversity in our seed crop. Congress, and not this Court, is the proper forum for resolving these important policy issues.[12]

CONCLUSION

For the foregoing reasons, respondents respectfully submit that Asgrow's petition for a writ of certiorari should be denied.

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[12] United States v. Rutherford, 442 U.S. 544, 555 (1979) ("federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with . . . prudent public policy"); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Respectfully submitted,

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